Harold W. Wesley, Jr. d/b/a H. W. Wesley Electric Company *and* International Brotherhood of Electrical Workers, AFL–CIO, CLC, Local Union No. 850. Case 16–CA–15370

July 10, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

Upon a charge filed by the International Brotherhood of Electrical Workers, AFL–CIO, CLC Local Union No. 850 (the Union) on December 18, 1991, and an amended charge filed on February 20, 1992, the General Counsel of the National Labor Relations Board issued a complaint on February 24, 1992, against Harold W. Wesley, Jr. d/b/a H. W. Wesley Electric Company, the Respondent, alleging that it violated Section 8(a)(5) and (1) by failing to make contributions to the Union's health and welfare, pension, vacation, and fringe benefit funds, failing to deduct union dues from the pay of unit employees and remit the dues to the Union, and failing to use the union hiring hall as its sole source of referral of applicants for employment. Copies of the complaint and notice of hearing were served on the Respondent. The Respondent filed a timely answer which admits certain factual allegations and neither admits nor denies other factual allegations.

On April 6, 1992, the General Counsel filed a Motion for Summary Judgment. On April 8, 1992, the Board issued an order transferring proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent filed no response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion for Summary Judgment

In its answer to the complaint, the Respondent admits that it was obligated under the terms of its collective-bargaining agreement with the Union to make monthly payments to the Union's health and welfare, pension, vacation, and fringe benefit funds and that, since about July 18, 1991, the Respondent has failed to make the required payments without notice to or bargaining with the Union. In addition, by its failure specifically to deny other factual allegations in the complaint as required under Section 102.20 of the Board's Rules and Regulations,[1] and in the absence of good cause shown, the Respondent effectively admits that it was obligated under the terms of its collective-bargaining agreement to deduct dues from the wages of bargaining unit employees and remit the dues to the Union, and to use the union hiring hall as its sole source of referral of applicants for employment. The Respondent also effectively admits that, since about July 18, 1991, in the case of the dues deduction, and since September 1, 1991, in the case of the hiring hall referrals, the Respondent has discontinued these obligations, also without notice to or bargaining with the Union.

It is well settled that an employer who is a party to an existing collective-bargaining agreement violates Section 8(a)(5) and (1) of the Act when it modifies the terms and conditions of employment established by that agreement without obtaining the consent of the Union. *Rapid Fur Dressing*, 278 NLRB 905, 906 (1986). Here the Respondent has admitted that it has unilaterally failed to comply with its obligations under the contract. The Respondent asserts in defense that

> one or more of the employees from the Union formed an alliance, partnership or other type of joint venture, and thereby contacted Respondent's major contracts and obtained and solicited in excess of seventy percent (70%) of Respondent's business, which has caused him to be unable to make payments to the Union's health and welfare, pension, vacation and fringe benefit fund [sic], and to further being unable to deduct Union dues from the employees' wages to remit these to the Union.

In addition, the Respondent asserts that it is

> . . . financially unable to meet the financial obligations imposed on him under the provisions of the collective bargaining agreement between Respondent and the National Association of Electrical Contractors, Inc., West Texas-New Mexico Chapter, and the International Brotherhood of Electrical Workers, AFL–CIO, CLC Local Union No. 850.

The Respondent's defenses, taken together, amount to nothing more than a claim that the Respondent is financially unable to meet its obligations under the contract. Financial necessity, however, even if proven, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by the provisions of a collective-bargaining agreement. *Tammy Sportswear Corp*., 302 NLRB 860 (1991); *Raymond Prats Sheet Metal Co*., 285 NLRB 194, 196

[1] Sec. 102.20 provides, in pertinent part,

> any allegation in the complaint not specifically denied or expained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

(1987); *Oak Cliff-Golman Baking Co*., 202 NLRB 614, 616 (1973).[2]

Accordingly, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the substantive complaint allegations and has not raised an adequate defense to those allegations. Because there are no material facts in dispute, and in the absence of any cause to the contrary having been shown by the Respondent, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a sole proprietorship owned by Harold W. Wesley, Jr., doing business as H. W. Wesley Electric Company, maintains its principal office and place of business at Plainview, Texas, where it has been engaged as an electrical contractor in the construction industry doing primarily commercial construction. The National Association of Electrical Contractors, Inc., West Texas—New Mexico Chapter (the Association) is an organization composed of various employers engaged in electrical contracting in the construction industry, one purpose of which is to represent its employer-members in the negotiation and administration of collective-bargaining agreements with various labor organizations, including the Union. By letter of assent dated April 1, 1988, the Respondent authorized the Association to represent it in the negotiation and administration of collective-bargaining agreements with the Union. During a representative 12-month period, the employer-members of the Association collectively purchased and received for use in their operations within the State of Texas goods and supplies valued in excess of $50,000 directly from suppliers located outside the State of Texas. Also during that period, the Respondent purchased and received for use in its operations goods and supplies valued in excess of $50,000 from other enterprises, including Marsh Supply, located in the State of Texas, which had received these goods directly from suppliers outside the State of Texas. Accordingly, we find that the Respondent, individually and by virtue of its participation in the Association, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by Respondent at all present and future job sites within the Union's geographic jurisdiction.

Since March 21, 1990, the Union has been recognized by the Respondent and the Association as the designated collective-bargaining representative of the employees in the unit described above, based on Section 9(a) of the Act. The Respondent, acting through the Association, and the Union have entered into successive collective-bargaining agreements effective from June 1, 1990, until August 1, 1991, and from August 1, 1991, through July 7, 1993, respectively.

The parties' collective-bargaining agreements require the Respondent to make monthly payments to the Union's health and welfare, pension, vacation, and fringe benefit funds, to deduct union dues from the wages of bargaining unit employees and remit the dues to the Union, and to use the union hiring hall as its sole source of referral of applicants for employment. The Respondent admits that, without notice and the Union's consent, since July 18, 1991, it has failed to make any payments to the benefit funds and to deduct and remit dues, and, since September 1, 1991, to use the union hiring hall as its sole source of employee referrals. Accordingly, the Respondent has refused to bargain with the Union within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing to continue in full force and effect all the provisions of its collective-bargaining agreement with the Union, by failing since July 18, 1991, to make contractually required contributions to the health and welfare, pension, vacation, and fringe benefit funds, by failing to deduct union dues from the wages of bargaining unit employees and remit the dues to the Union, and by ceasing to use, since September 1, 1991, the Union's hiring hall as its sole source of referral of applicants for employment, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

[2] As Member Oviatt stated in *Tammy Sportswear Corp*., supra, he is of the opinion that there may be limited circumstances in which an employer's financial inability to pay may constitute a defense to an allegation that it unilaterally and unlawfully ceased contractually required payments to a union benefit fund. To make this defense successfully, an employer must establish that it continued to recognize—and did not repudiate—its contractual obligations. To satisfy this requirement, an employer must prove that its nonpayment was followed by its request to meet with the union to discuss and resolve the nonpayment problem. In so doing, an employer demonstrates its adherence to the contract and the bargaining process. In such circumstances, Member Oviatt would find that an employer's nonpayment of contractually required benefit fund payments would not violate Sec. 8(a)(5) of the Act. Such circumstances, however, are not present in this case.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make all contractually required payments to the Union's health and welfare, pension, vacation, and fringe benefit funds that would have been paid but for the Respondent's unlawful failure to make those payments,[3] and to make whole the unit employees by reimbursing them for any expenses they incurred because of the Respondent's failure to make those payments, in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to deduct and remit to the Union all dues authorized by checkoff to be deducted from the employees' wages, with interest as provided in *New Horizons*, supra, and to use the union hiring hall as its sole source of referral of applicants for employment as required in the collective-bargaining agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Harold W. Wesley, Jr. d/b/a H. W. Wesley Electric Company, Plainview, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with International Brotherhood of Electrical Workers, AFL–CIO, CLC Local Union No. 850, by unilaterally failing to make payments to the Union's health and welfare, pension, vacation, and fringe benefit funds, failing to deduct union dues from the wages of unit employees and remit the dues to the Union, and failing to use the union hiring hall as the sole source of referral of applicants for employment, as required by the parties' collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all contractually required payments to the Union's health and welfare, pension, vacation, and fringe benefit funds that have not been paid and that would have been paid in the absence of the Respondent's unlawful failure to make those payments, and make the employees whole by reimbursing them for any expenses they incurred as a result of the discontinuance of those payments, in the manner set forth in the remedy section of this decision.

(b) Comply with the terms of the dues-checkoff provision in the collective-bargaining agreement and remit to the Union all dues checked off pursuant to that provision and valid authorizations and required by the agreement to be turned over to the Union by the Respondent, with interest, as set forth in the remedy section of this decision.

(c) Use the union hiring hall as the sole source of referral of applicants for employment.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay or monies due under the terms of this Order.

(e) Post at its facility in Plainview, Texas, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Sign and return to the Regional Director sufficient copies of the notice for posting by International Brotherhood of Electrical Workers, AFL–CIO, CLC Local Union No. 850, if willing, at all places where notices to users of its hiring hall are customarily posted.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make whole'' remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with International Brotherhood of Electrical Workers, AFL–

CIO, CLC Local Union No. 850, as the exclusive collective-bargaining representative of the unit by unilaterally failing to make payments to the Union's health and welfare, pension, vacation, and fringe benefit funds, by failing to deduct union dues from the wages of unit employees and remit the dues to the Union, or by failing to use the union hiring hall as the sole source of referral of applicants for employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all contractually required payments to the Union's health and welfare, pension, vacation, and fringe benefit funds that have not been paid and that would have been paid in the absence of our unlawful failure to make those payments, and WE WILL make our employees whole, with interest, for any expenses they may have incurred as a result of our failure to make those payments.

WE WILL deduct union dues and remit the dues to the Union as required under the collective-bargaining agreement, with interest.

WE WILL use the union hiring hall as our sole source of referral of applicants for employment.

HAROLD W. WESLEY, JR., D/B/A H. W. WESLEY ELECTRIC COMPANY